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AUTHOR Evans, William J., Jr.
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ABSTRACT

This chapter examines cases reported during 1990 that involved tort claims within the school context. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. Included are cases involving school officials, school employees, students, and in some instances others visiting school grounds. Tort cases discussed in this chapter are organized under the following sections: (1) negligence; (2) negligence defenses; (3) liability insurance; (4) attorney fees; (5) employee injuries, workers' compensation; (6) assault and battery; (7) defamation; (8) intentional infliction of emotional distress; (9) products liability; (10) construction contracts; and (11) constitutional torts. (MLF)

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TORTS

William J. Evans, Jr.

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INTRODUCTION

Torts are separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe each other. The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. This chapter will examine those cases reported during 1990 which involved tort claims within the

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school context. Included are cases involving school officials, school employees, students, and in some instances others visiting school grounds. Torts arising out of interscholastic sport participation are not included as they are discussed in Chapter 6.

NEGLIGENCE

A charge of negligence can result when an improper act or a failure to act results in an injury to another person. Negligence is established when one's actions fall below a standard of care expected of a reasonable person. The behavior expected of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances. Against that standard, a court will determine whether liability may be imposed. Questions of law are determined by judges, while questions of fact are decided by juries.

The first case examined in this category involved actions by a principal. New York students and their mother brought an action against the school district and principal to recover for the principal's decision to release the students to the custody of their father. In affirming the trial court's decision, the appellate court found that the principal had exercised a degree of care consistent with that of a reasonably prudent parent. The father had presented a court order transferring custody to him, and the principal was bound to obey it.[1]

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases, divided into categories according to where or how injury was sustained, illustrate a variety of lawsuits with varying outcomes.

Off School Property and After School Hours. The four cases in this section involve injuries incurred in several different types of locations. In each instance the school district was the prevailing party, which illustrates the difficulty of holding districts liable for student behavior beyond the schoolyard.

The mother of a New York teenager brought a personal injury action against her son's school district. The boy was injured in an accident in his home which involved chemicals he had stolen from school earlier in the day. The trial court denied the school board's motion for summary

1. Sprecher v. Port Washington Union Free School Dist., 561 N.Y.S.2d 284 (App. Div. 1990).

judgment and the decision was reversed on appeal. The student admitted that the teacher had specifically told the class to never remove chemicals from the classroom, and the teacher had gone over safety procedures in the classroom with him. The court found that the student's conduct, aside from being unforeseeable, went beyond contributory negligence and rose to the level of culpability. This served to replace any negligence on the part of the defendant school district.[2]

An Arkansas case examined the question of whether a school district must insure a bus chartered for a one day field trip when the bus is not owned by the school district nor driven by a district employee. The answer given by the court was no. The injuries sustained by a junior high school student on a field trip led to the action her parents brought against the school district. In upholding the dismissal of the case, the court found no legislative intent for a school district to insure a bus owned by an independent entity.[3]

A New York kindergarten student brought home a project from school which consisted of toothpicks glued to construction paper. While in the home of a neighbor, she took one of the toothpicks and inserted it into the ear of a younger child. Her mother's suit for damages was dismissed by the trial court and the decision was upheld on appeal. The court found that the kindergarten student had passed out of the orbit of the school's authority at the time of the accident. No duty was found owed to the injured child as she was under the supervision of her mother when the incident occurred. Accordingly, the school was not liable for allowing a dangerous instrument to be removed from the school. The intended use of the toothpicks was not seen to have created a foreseeable danger.[4]

A nineteen-year-old New York student, who was injured while at a work-study job, brought an action for damages against the school board and Board of Cooperative Educational Services (BOCES). The summary judgment granted the defendants was affirmed on appeal. The court held that since the student was over the age of majority at the time of the accident, the less demanding standard of "reasonable care" was appropriate. Furthermore, the work-study agreement imposed no specific duty on the school, and only a general supervisory role on BOCES. All evidence supported the conclusion that it was a job related accident for which the plaintiff properly received workers' compensation benefits.[5]

School Settings During School Hours. The cases in this section involve injuries incurred during school hours in which sovereign or statutory immunity was not advanced as a defense by the school district or employee.

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2. Brazell v. Board of Educ. of Niskayuna Schools, 557 N.Y.S.2d 645 (App. Div. 1990). *See* Greiner v. Whitesboro School Dist., 562 N.Y.S.2d 255 (App. Div. 1990). Suspension of a student who was allegedly intoxicated was not found to be the proximate cause of an automobile accident which occurred several hours later.
3. King v. Little Rock School Dist., 782 S.W.2d 574 (Ark. 1990).
4. Fuzie v. South Haven School Dist., 553 N.Y.S.2d 961 (Sup. Ct. 1990).
5. Kennedy v. Waterville Cent. School Dist., 555 N.Y.S.2d 224 (Sup. Ct. 1990).

A sixth grade student was injured when he was struck by a rock thrown by a fellow student during recess. His action to recover for personal injuries resulted in a summary judgment for the school district. That decision was affirmed on appeal as the New York court found the school could not have been expected to anticipate the intervening actions of a third party.[6]

Also during recess, a Louisiana student was injured when she fell or was pushed off a six-foot slide. The teacher on duty had over twenty-two years of experience with young students, and she had taken safety courses instructing her how to teach children to play safely on playground equipment. These facts led the appeals court to reverse a decision which found the board of education liable for the student's injuries.[7]

In two cases with similar facts, an Alabama fourth grade student was injured when struck by a rock thrown by another student,[8] and an Ohio first grade student was struck in the eye by a dirt ball thrown by an older student.[9] In denying the students' claims for damages, the courts found that no amount of planned supervision by teachers would have prevented the unforeseeable accidents.

A junior high school student was injured when she slipped on a green pepper on the floor of her school's cafeteria. The Maine Supreme Court affirmed the trial court's decision absolving the city of liability. There had been no actual or constructive knowledge by the city of the existence of a foreign object on the floor.[10]

A sixth-grade Alabama student was injured by falling glass after a ball hit a light bulb in a light fixture hanging from the ceiling of the school's gymnasium. Suit against the school principal and the physical education teacher resulted in a summary judgment in the principal's and teacher's favor. That decision was upheld on appeal as neither employee was found to have any responsibility for the design or maintenance of the light bulbs or light fixtures.[11]

Another accident involving stairs in a school resulted in a claim for damages by a Louisiana student. The trial court's decision for the city was upheld on appeal. Sufficient evidence was not presented that there was a foreign substance on the stairs which could have caused the student to slip and fall.[12]

A North Carolina student who was allegedly sexually assaulted by her

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6. Hauser v. North Rockland Cent. Dist. No. 1, 560 N.Y.S.2d 835 (App. Div. 1990).
7. Brooks v. Orleans Parish School Bd., 560 So. 2d 633 (La. Ct. App. 1990).
8. Green v. Bester, 568 So. 2d 792 (Ala. 1990).
9. Allison v. Field Local School Dist., 553 N.E.2d 1383 (Ohio Ct. App. 1988). *See* Amendola v. Geremia, 571 A.2d 131 (Conn. Ct. App. 1990). A trial was necessary to determine whether a reasonably prudent person (student) would spray another person with a substance from a bottle without first inspecting the contents of the bottle.
10. Milliken v. City of Lewiston, 580 A.2d 151 (Me. 1990).
11. Beasley v. Morton, 564 So. 2d 45 (Ala. 1990).
12. Jones v. City of New Orleans, 559 So. 2d 28 (La. Ct. App. 1990).

school's principal brought an action for damages against the school board and superintendent. Neither defendant was found liable to the student for the negligent hiring and retaining of the principal even though the principal had earlier resigned from another school after a similar accusation. Employment recommendations contained no evidence that the principal was a pedophile, and he had performed his duties in a satisfactory manner for sixteen years before the alleged incident. Furthermore, the principal's role in counseling a truant student was unrelated to sexual assault and thus he would have stepped out of the course and scope of his employment in assaulting the student.[13]

En route to and from School. A fourth-grade Missouri student suffered an eye injury after an object was thrown through an open bus window. A complaint was filed on his behalf against the school district and bus company. The jury returned an award for the plaintiff which was reduced as the student was found 40% at fault. The plaintiff appealed, and there was a cross-appeal by the bus company, but the decision from the trial court was affirmed.[14] The bus company had met its primary responsibility of complying with safety laws, rules, and regulations, although testimony revealed that the throwing of objects at the bus had been a regular occurrence. Therefore, the bus company's claim of unforeseeability was rejected. Additionally, the lowered window was seen as a proximate cause of the injury. The court found that the state's regulation limiting the degree to which a bus window can be opened was intended to prevent the harm which befell the student.

The mother of a severely handicapped and mentally retarded New York student brought an action against the city board of education, operator of the school bus company, and city to recover for injuries the student sustained while either being transported, or while at school. In ruling against the student, who was unable to communicate for himself, the court found nothing to indicate that the injury was caused by an agency or instrumentality of the defendants.[15]

A California elementary school pupil was killed while crossing the street after getting off the school bus. His parents' negligence action against the school district was initially unsuccessful as the district was granted a summary judgment. In reversing that decision, the appeals court found that the district had prior awareness that children were crossing the street after the bus had departed. Whether the care exercised was reasonable was held to be an issue properly determined by trial.[16]

Trial also was ordered in a Florida case where a summary decision for a school board was reversed. A nine-year-old student had been required

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13. Medlin v. Bass, 398 S.E.2d 460 (N.C. 1990).
14. Lockett v. Board of Educ. for School Dist. No. 189, 555 N.E.2d 1055 (Ill. App. Ct. 1990).
15. Rabena v. City of N.Y., 556 N.Y.S.2d 807 (Civ. Ct. 1990).
16. Farley v. El Tejon Unified School Dist., 274 Cal. Rptr. 780 (Ct. App. 1990).

to transfer to another school because of a need for speech therapy. The school board specifically directed the child's father to use public transportation until school bus transportation could be arranged. During that time, the father used public transportation with his son and instructed him daily on how to cross a busy intersection near the school. On the first day the boy was allowed to go to school alone, he was struck and killed by an automobile. The board agreed that it had breached its duty when a clerical error delayed transportation for two weeks. The court failed to recognize the board's contention that the father's failure to supervise his son was an intervening cause relieving the school board of liability. If, as the board maintained, the child was too young to make the trip unescorted, a jury question of comparative negligence could be raised.[17]

The role of parental supervision was the determining point in another Florida case. While walking to school with his mother, a student left her side and walked out into the middle of the road. The injuries he sustained when he was hit by a car resulted in an action against the county and county school board. Summary judgment for the county and board was upheld on appeal. The court determined that no number of traffic signals, traffic control devices, or school maps with safe routes identified can provide any greater protection for a child than the attendant supervision of a parent. The sole proximate cause of the student's injuries was seen as his stepping out into the street without keeping a proper lookout while under his mother's care.[18]

School Buildings and Grounds. The issue of assumed risk served to preclude a summary judgment for a Georgia school board. A student's mother had been called to school to pick up her son who had been placed in detention. While descending a stairway, the parent slipped on steps which were wet due to rainy conditions. Although she had negotiated the steps upon entering the building, the court held it to be a matter for trial whether this served as notice of possible danger relieving the school board of liability.[19] An Illinois woman brought an action for injuries she sustained in a school parking lot. The appeals court reversed the summary judgment for the school district. Even though the woman admitted that she knew of the existence of a curb over which she tripped, whether the district had a duty to warn her of the curb was held to be a matter for trial.[20]

School-related Activities. A California high school student was injured during a school hypnotism show sponsored by a parent-teacher-student association. At issue was the release from liability signed by the student and her father. The trial court granted summary judgment for the

17. Brunson v. Dade County School Bd., 559 So. 2d 646 (Fla. Ct. App. 1990).
18. Garcia v. Metropolitan Dade County, 561 So. 2d 1194 (Fla. Dist. Ct. App. 1990).
19. Spivey v. Board of Educ. of Savannah & Chatham County, 391 S.E.2d 783 (Ga. Ct. App. 1990).
20. Zumbahlen v. Morris Community High School Dist. No. 101, 563 N.E.2d 1228 (Ill. App. Ct. 1990).

association and school district and the student appealed. In reversing that decision, the appeals court found a release signed by a parent proper, as parents have the right to enter into a contract on behalf of their children. However, the release itself was not found to bar recovery for injuries by the student. It contained no language speaking of a release from liability for negligence or bodily injury. Lacking these specifics, the court found a triable issue to exist.[21]

NEGLIGENCE DEFENSES

Even if an injured plaintiff can satisfy the *prima facia* case, the defendant school district, administrator, or teacher still has a number of defenses available to overcome the claim. These defenses range from immunity to the more usual affirmative defenses. The motivation behind the immunity defense is to limit the flow of public money to private citizens. Liability payments could detract from the educational functions of the schools. Affirmative defenses keep plaintiffs from recovering for behavior that in some way is responsible for the injury that occurred.

Immunity

Common Law (Governmental Immunity). Traditionally courts have been reluctant to disturb this defense as school districts are state agencies created by state law to perform a governmental function. However, the use of this defense is increasingly being limited by statute and judicial interpretation. Litigation in this area generally seeks to test limits and exceptions. In only one of this year's six cases was a plaintiff successful in challenging governmental immunity.

A fifteen-year-old student was killed when she was struck by an automobile after departing from a school bus. The trial court granted summary judgment in favor of the driver and school district in the suit for damages brought on behalf of the student. That decision was reversed on appeal. For several days prior to the accident, the student had been leaving the bus by way of the rear emergency exit to avoid harassment habitually suffered by female students who rode the same bus. The driver had been aware of both situations, but she had not made any effort to prevent them. The court concluded that the driver could be held legally responsible for the safety of passengers discharged near a highway where the driver knew passengers crossed the highway to reach their homes. The stopping of a school bus for the purpose of discharging passengers, and

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21. Hohe v. San Diego Unified School Dist., 274 Cal. Rptr. 647 (Ct. App. 1990).

the driver's duties attendant to the stopping of the bus, were deemed to constitute the operation of a motor vehicle. Therefore, the school district was found liable for the driver's actions as the violations fell within the motor vehicle exception to governmental immunity.[22]

A Tennessee teacher was assaulted in her school building prior to the beginning of the school year on a day in which teachers were allowed to come into school to set up their classrooms. At the time of the assault, most of the school's doors were locked. However, the assailant entered through a door which had been wedged open with a glove to allow personnel access to the school. In her action for damages, the trial court decision for the school board was upheld. The method of securing the school building was found a discretionary decision of the principal for which the board was protected by governmental immunity.[23]

A construction contractor's claim for lost profits against a Missouri school district constituted a tort claim, rather than a breach of contract claim, and was thus barred by sovereign immunity. At issue was the construction of an athletic track. As such construction is a distinct part of the secondary educational process, the ability to enforce provisions in a contract related to the construction was seen as a governmental function immune from tort liability.[24]

A North Carolina student was permanently disabled when he was struck by a truck while attempting to reach his assigned school bus stop. The student's action against the school board alleged negligent design of a school bus route and stop location. The trial court dismissed the suit and appeal was sought. In affirming the decision, the appellate court found that the board had not waived its governmental immunity by obtaining a liability insurance policy. While a school board can, through such a policy, determine whether or to what extent to waive immunity, the court found it inconceivable that the board intended to waive immunity for injuries associated with the design of a bus route or location of a bus stop.[25]

The summary judgment in a wrongful death action, for a student who was killed by a motorist, was upheld on appeal. Supervision of children as they return home from school was determined by the Georgia court to

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22. Nolan v. Bronson, 460 N.W.2d 284 (Mich. Ct. App. 1990). *See* Martinez v. Moroldo, 553 N.Y.S.2d 751 (App. Div. 1990). The issue of whether a mother had given written permission to drop off a student at home precluded a summary judgment for the bus company and board of education. Clomon v. Monroe City School Bd., 557 So. 2d 1100 (La. Ct. App. 1990). An automobile driver, who struck and killed a child departing a school bus, was awarded damages for severe emotional trauma.
23. Doe v. Board of Educ. of Memphis City Schools, 799 S.W.2d 246 (Tenn. Ct. App. 1990).
24. Joske Corp. v. Kirkwood School Dist. R-7, 903 F.2d 1199 (8th Cir. 1990).
25. Beatty v. Charlotte-Mecklenburg Bd. of Educ., 394 S.E.2d 242 (N.C. Ct. App. 1990). *See* Brown v. Egan Consol. School Dist. #50-2, 449 N.W.2d 259 (S.D. 1989). Regarding an accident a driver had with a school bus, the school district waived its sovereign immunity to the limit of its liability insurance coverage.

be a discretionary act for which a principal was entitled to the defense of official immunity.[26]

An Illinois student and her mother brought an action alleging negligence and willful and wanton misconduct by her teachers and school district. While jazz dancing during physical education class, the student fell when her foot slipped between two overlapping mats. She was then denied permission to see the school nurse. In her next two classes she was also refused permission to see the nurse. Subsequently, it was discovered that she had broken her ankle. The trail court dismissed the action and appeal was sought. The dismissal was upheld as the court found immunity conferred to teachers from negligence actions unless their conduct was willful and wanton. The plaintiffs failed to make such a showing as there was no allegation that the defendants intended to harm the student, nor did the facts support a finding of an utter indifference or conscious disregard for the student's safety.[27]

Statutory Immunity. Within certain limitations, the South Carolina Supreme Court has abolished the doctrine of sovereign immunity.[28] In response, the state legislature enacted a tort claims act. The effective date of the act was at issue following an accident for which a student sought damages for severe burns he received while working on school premises. The court found that the effective date of the act served to limit the recovery amount to that stipulated by the act. Possession by a school district of liability coverage in excess of the statutory limit was not found to constitute a waiver of immunity up to the coverage limit. Finally, the parents claim for medical expenses and loss of services were separate claims each bringing an entitlement to damages.[29]

An elementary student was injured when she fell from a set of monkey bars during recess on an Illinois school playground. Her negligence action against the school district resulted in a summary judgment for the district. On appeal, the statutory immunity granted the district was successfully challenged and the case was remanded for trial. The court found that the supplying of equipment and the condition of the premises are not part of the direct teacher-student relationship. Thus, they fall outside of the limited protection of the immunity provisions. In addition, the two persons supervising the playground were uncertified employees. As such, they were not entitled to the immunity statutorily granted to a certified employee and thus vicariously to the school district.[30]

An Illinois student was injured when she slipped on icy stairs as she

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26. Lewis v. McDowell, 390 S.E.2d 605 (Ga. Ct. App. 1990). *See* Montgomery v. City of Detroit, 448 N.W.2d 822 (Mich. Ct. App. 1989). A principal was entitled to immunity as his alleged failure to provide emergency procedures was a discretionary decision.
27. Gara v. Lomonaco, 557 N.E.2d 483 (Ill. App. Ct. 1990).
28. McCall v. Batson, 329 S.E.2d 741 (S.C. 1985).
29. Wright v. Colleton County School Dist., 391 S.E.2d 564 (S.C. 1990).
30. Jastram v. Lake Villa School Dist. 41, 549 N.E.2d 9 (Ill. App. Ct. 1989).

exited her school for recess. The state's tort immunity act explains that a school district may not be held liable for any injuries suffered as a result of weather conditions including the accumulation of ice. Absent a finding of willful and wanton misconduct by the school board, the trial court's dismissal of the student's action for damages was upheld by the appeals court.[31]

Parents of a Montana student removed him from school and enrolled him in a private school after he had a series of verbal and physical altercations with other students. Following that action, the parents brought a suit for damages alleging that the school district and its employees had failed to provide a safe educational environment in violation of the state constitution's guarantee of a free quality elementary and secondary education for its citizens. The trial court granted a summary judgment for the school district, finding the defendants immune from suit. That decision was upheld on appeal as the parents failed to show that the school employees were not acting within the scope of their authority.[32]

A recreational use statute grants immunity from liability to owners of property in New York who permit members of the public to come on their property to engage in several enumerated recreational activities.[33] Sledding and tobogganing are among those listed. When an action was brought on behalf of a child who was injured while sliding on an inner tube on school property, the district claimed statutory immunity from the suit. When the court held the district immune from liability, the plaintiffs moved for a dismissal of the defense claiming the injury was a result of sliding not sledding. In denying the plaintiff's motion, the court examined the definition of the term "sled" as it has evolved from a vehicle on runners to a vehicle that usually has runners. The court also found that the property in question was of a type physically conducive and appropriate for public use in recreational sledding.[34]

A Missouri teacher who was raped by a student brought an action against two assistant principals alleging negligent supervision. The trial court's dismissal of the action was upheld on appeal. The court explained that an injured employee who sues a co-employee for injuries covered by workers' compensation must allege more than that the employee failed to provide a reasonably safe place to work.[35]

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31. Washington v. Chicago Bd. of Educ., 562 N.E.2d 541 (Ill. App. Ct. 1990).
32. Hayworth v. School Dist. No. 19, 795 P.2d 470 (Mont. 1990).
33. General Obligations Law Section 9-103(1)(a).
34. Gruber v. Fairport Cent. School Dist., 556 N.Y.S.2d 965 (Sup. Ct. 1990). *See* Farber v. Pennsbury School Dist., 571 A.2d 546 (Pa. Commw. Ct. 1990). A student who fell while participating in a district sponsored race in which he was carrying another student on his back failed to show that the activity fell within the real property exception to immunity; Schleft v. Board of Educ. of Los Alamos Pub. Schools, 784 P.2d 1014 (N.M. Ct. App. 1989). A state tort claims act waiver of immunity in maintenance of buildings applied to both the school grounds and school building.
35. Stewart v. Little, 797 S.W.2d 862 (Mo. Ct. App. 1990).

While on a school-sponsored trip, a Texas high school student was injured when she struck her head on the top of a rear exit door of a school bus. The student had been sitting unsupervised in the doorway just before the accident. The action for damages against the school district and bus driver resulted in a summary judgment and the student sought appeal. In upholding the decision, the appeals court found the defendants immune from liability. There was no evidence of negligence in the operation or use of the school bus which could have provided exception to the immunity defense.[36]

Other Defenses

Comparative Negligence. Comparative negligence allows the jury the opportunity to allocate damages in proportion to the amount of responsibility the various parties had for the injury. Cases from Iowa, Louisiana, and New York were reported in the comparative fault area.

An eleven-year-old Iowa student was injured when he slipped and fell while sliding on a patch of ice during recess. At the trial for damages, the jury found the student 75% negligent, and the school district 25% negligent. On appeal the plaintiff claimed that the district court had erred in instructing the jury, and improperly excluded portions of a recreational safety expert's testimony. In affirming the opinion, the appellate court found no prejudicial error in the jury instructions. The expert's testimony on standards of care the school district was responsible for in the maintenance and supervision of its playground area was found properly excluded. The testimony fell outside his area of expertise or required him to speculate and give opinions on questions of law.[37]

During summer recess, two students obtained four partially used cans of flammable duplicating fluid from a garbage dumpster located in the rear of a Louisiana elementary school. When they began to play with the fluid by creating small fires, another child came upon the scene and was badly burned. Suit against the students and the school board was brought on behalf of the injured child. The trial court dismissed the action against the board and apportioned fault between the students. On appeal, the court determined that the school board was improperly dismissed from the suit. The court cited the board's duty to properly dispose of the duplicating fluid, and its knowledge of the likelihood that students would play in and around the dumpster. The injuries were held reasonably foreseeable and the school board was re-assessed to be 55% at fault.[38]

A New York appellate court ordered a new trial in a negligence action

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36. LeLeaux v. Hamshire-Fannett Indep. School Dist., 798 S.W.2d 20 (Tex. Ct. App. 1990).
37. Oldham v. Shenandoah Community School Dist., 461 N.W.2d 207 (Iowa Ct. App. 1990).
38. Brown v. Tesack, 566 So. 2d 955 (La. 1990).

brought to recover for injuries a student sustained while playing touch football on an icy asphalt surface.[39] The court agreed that the school board had failed to maintain the schoolyard in a reasonably safe condition. Additionally, school officials had knowingly allowed unsupervised play before school. While the defendants were found liable, a new trial was ordered on the issue of apportionment of fault. Having determined that the student assumed the risk of injury by participating in a football game on an icy surface, the court held that the jury should have found his actions to be the proximate cause of his injuries.

Notice of Claim. Plaintiffs are increasingly seeking the right to file late notice of claim. Fourteen cases were reported, a number of which were decided on largely technical grounds.[40] The first case is of particular interest. A New York court found it an issue for trial whether magazine articles about asbestos could have constituted notice.

Following the death of a former junior high school student, a wrongful death action was brought against a New York City board of education. Claim was made that the death in 1986 was a result of exposure in school to friable asbestos between the years of 1967 and 1970. The court granted the city's motion for summary judgment. New York law provides that an owner out of possession, without contractual or statutory obligation to maintain the premises, is not liable in tort to third persons injured as a result of a dangerous condition which arises on the premises. However, a triable issue of fact was recognized regarding the school board's constructive notice. Although no federal or state safety standard banning the use of asbestos materials was in place in the 1950s and 1960s, the plaintiff pointed to numerous articles published in general circulation magazines. The school board was unsuccessful in its attempt to join the school's architect and the asbestos manufacturer in the action. The architect could only have been found liable for a negligent performance of his professional services. Since he could not have known of the deleterious effects of asbestos between 1956 and 1959, summary judgment was found in his favor. The court granted the manufacturer's motion to dismiss for lack of jurisdiction due to the board's failure to meet notice requirements.[41] The question of whether a school board's general duty to supervise students is dependent upon notice of specific dangers was addressed in a New York case. A young student sought damages for injuries received when she was trampled by running students. Following instructions to the jury reflecting the necessity of notice, the jury returned a verdict in favor of the

39. Chan v. Board of Educ. of City of N.Y., 557 N.Y.S.2d 91 (App. Div. 1990).

40. *See* Environmental Compliance Inc. v. William Floyd Union Free School Dist., 552 N.Y.S.2d 39 (App. Div. 1990); Aetna Casualty & Surety Co. v. Denver School Dist., 787 P.2d 206 (Colo. Ct. App. 1989); Kraimock v. Superior Court, 265 Cal. Rprt. 715 (Ct. App. 1990); Kaye v. Town of Manchester, 568 A.2d 459 (Conn. Ct. App. 1990).

41. Barnett v. City of Yonkers, 731 F. Supp. 594 (S.D.N.Y. 1990).

school board. That decision was reversed on appeal as the jury instructions were found to be an incorrect statement of law. The court found that where the duty to supervise is mandatory, notice is not an issue.[42]

A student's mother made application to serve a late notice of claim against a New York school district. It was alleged that the student was injured in the school's gymnasium during a game of kick ball. In denying the application, the court found a failure to show that the school district had received actual notice of the essential facts of the claim within a reasonable time. There was no allegation that anyone actually witnessed the alleged incident, and the school had no related record.[43]

The Maine Supreme Court decided a case in which parents of an injured student were not found to have met notice requirements by merely returning an accident form to a school's bookkeeper. The parent's claim for additional medical benefits for their daughter, after a year of benefits had ended, was barred by the late notice of claim.[44]

In another Maine case, a fifth grade student brought an action alleging that the city, public schools, and principal were negligent in failing to supervise a teacher who was convicted of committing unlawful sexual contact with the student. The dismissal of the suit as untimely was upheld on appeal. The court rejected the contention that the student's minority status constituted good cause to extend the notice requirement. In addition, neither the mistaken belief that the district attorney was acting on his behalf, nor his ignorance of his rights and duties under the tort claims act excused the student from filing timely notice of claim.[45]

A former student brought suit against his former teacher and Minnesota school district claiming sexual abuse thirteen years earlier. At some point after the alleged abuse, the plaintiff suffered traumatic amnesia which inhibited his memory of the assaults. The trial court found the claims barred as untimely. While appeal of that decision was pending, the Minnesota Legislature enacted a statute which stated that a sexual abuse claim does not arise until the victim knew or had reason to know his injury was caused by abuse.[46] The appeals court reversed the earlier decision and remanded the case for trial. That decision was reaffirmed when, at the direction of the state supreme court, the appellate court considered and upheld the

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42. Coon v. Board of Educ. of the City of N.Y., 554 N.Y.S.2d 110 (App. Div. 1990). *See* Cooper v. Baldwin County School Dist., 386 S.E.2d 896 (Ga. Ct. App. 1989). The school district was not found to have breached a duty to protect a student from a knife attack.
43. Salyer v. Valley Cent. School Dist., 558 N.Y.S.2d 746 (App. Div. 1990). For another example of failure to make timely notice *see* Stoetzel v. Wappingers Cent. School Dist., 561 N.Y.S.2d 71 (App. Div. 1990).
44. Smith v. School Administrative Dist. No. 58, 582 A.2d 247 (Me. 1990).
45. Martin v. City of Biddeford, 568 A.2d 1103 (Me. 1990).
46. Minn. Stat. § 541.07(1) (1988).

constitutionality of the statute. In addition, the statute was found retroactively applicable, requiring the case to again be remanded for trial.[47]

A California school district sued various defendants in connection with asbestos products in its school buildings. One defendant moved for dismissal of the claim stating that it had not been served notice within three years of the commencement of the action, and that more than two years had lapsed since the filing of the complaint. In denying the petition, the court explained that the action was "complex litigation" under California judicial rules.[48] Within that context, the trial court had given stay orders which gave rise to the proceeding. That stay was found to have precluded a notice of claim until it was lifted. After factoring in the length of the stay, the court determined that the summons and complaint came well within the required three years.[49]

A worker sued a New York school district to recover for damages allegedly incurred through the installing of asbestos products in schools. The action was dismissed as the worker failed to timely file notice of claim. Although a statute had been enacted which extended the period of limitations for some asbestos related actions, it was only intended to revive those claims which had previously been barred.[50]

A New York State trooper sought to serve a late notice of claim for an injury he allegedly sustained when he fell on a set of stairs while investigating a school burglary. The trial court's denial of the motion was upheld on appeal. The court found that the trooper failed to inform the school district that he was injured as a result of the fall. The fact that a school employee was present at the time of the fall did not meet that obligation. The lack of notice was found supported by the fact that the trooper made no effort to seek legal counsel until "quite recently" when he learned of the severity of his injuries.[51]

In Louisiana, parents of a student who was injured when he fell from bleachers at a high school sued the school board for damages. When the trial court held that the Parish Commission Council could not be added as a defendant, the parents sought appeal. In affirming the decision, the appeals court held that there was no proof the close relationship between the school board and the Council supported the allegation that the council was or should have been informed of the suit. The fact that the student's

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47. K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990). *See* Nichols v. Board of Educ. of Ballston SPA Cent. School Dist., 562 N.Y.S.2d 831 (App. Div. 1990). A late notice of claim was allowed where the school district had actual notice of the student's injury.
48. Calif. Rules of Court, app. div. 1, § 19.
49. Highland Stucco & Lime v. Superior Court, 272 Cal. Rptr. 60 (Ct. App. 1990). *See* Drayton Pub. School Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410 (D.N.D. 1989). Summary judgment was denied because issues of fact existed in connection with the commencement of the limitations period and the district's claim of fraud and concealment.
50. Vine v. John Manville Sales Corp., 551 N.Y.S.2d 640 (App. Div. 1990).
51. Kalinsky v. State Univ. of N.Y., 557 N.Y.S.2d 577 (App. Div. 1990).

father was in the military service, was not found to have prejudiced his ability to pursue his cause of action.[52]

Following an accident in which an automobile allegedly was rear-ended by a school bus, two California passengers sought to bring an action for damages. Their complaint was timely filed with the board of education, but the proper party for the suit was the county office of education. In finding that the trial court had properly denied a motion for reconsideration, the court pointed to the fact that despite notification that they had served the wrong entity, the appellants did not seek to file a late-claim application with the correct entity for over a year.[53]

LIABILITY INSURANCE

A Michigan school district sued its liability insurer to recover costs incurred in the defense and settlement of an alleged civil rights violation. A teacher successfully alleged that she was denied tenure because of her religious beliefs. While the case was pending, the district agreed to a monetary settlement. The trial court's decision for the insured was upheld on appeal. The insured's alleged breach of a collective bargaining agreement prohibiting religious discrimination was not found to be a breach of contractual obligation covered by a policy exclusion.[54]

Reimbursement for costs incurred in the defense and settlement of a civil rights action also was at issue in a Missouri case. The settlement had been as a result of an alleged nonrenewal of a teacher's contract in retaliation for the teacher's exercise of first amendment rights in joining a particular educational organization. The Eighth Circuit Court of Appeals affirmed that the "wrongful act" language in the school district's liability policy covered the civil rights suit. However, the district was not found entitled to attorney fees as the suit was essentially to redress violations of civil rights, not contract-type remedies.[55]

ATTORNEY FEES

A Florida plaintiff, who unsuccessfully brought a civil rights action against a county school board, appealed an order requiring her to pay costs

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52. Hernandez v. Plaquemines Parish School Bd., 563 So. 2d 516 (La. Ct. App. 1990).
53. Santee v. Santa Clara County Office of Educ., 269 Cal. Rptr. 605 (Ct. App. 1990). *See* Johnson v. San Diego Unified School Dist., 266 Cal. Rptr. 187 (Ct. App. 1990). The State Board of Control's failure to inform a student that it was not the proper agency for service in an injury claim did not serve to extend the notice requirement.
54. School Dist. for City of Royal Oak v. Continental Casualty Co., 912 F.2d 844 (6th Cir. 1990).
55. New Madrid County Reorganized School Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990).

and attorney fees. The district court reversed the ruling explaining that, pursuant to federal law, a defendant board is not entitled to attorney fees simply because it prevails. There was no showing that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.[56]

A nonunion teacher petitioned for review of a decision of the Public Employment Relations Board which rejected most of the teacher's objections to the withholding of a portion of his paycheck by the union for inappropriate purposes. That decision was reversed and the case was remanded. On remand, the court held that the very high number of hours claimed reflected the inexperience of the lead counsel more than any complexity or novelty of the issues. Additionally, a multiplier of 0.6 rather than the requested 2.0 would be used in determining fees to reflect the petitioner's partial success.[57]

A school board official successfully brought an action to stop a recall election. She then filed a motion claiming that as a public interest litigator, attorney fees and court costs should not be assessed against her. In granting the motion, the court held that four tests were met: (1) the case was designed to effectuate strong public policies; (2) numerous people benefitted; (3) only a private party could have been expected to bring the suit; and (4) the board official did not otherwise have a sufficient economic incentive to file suit.[58]

In Louisiana, a principal brought suit against the school board for attorney fees incurred when he brought suit to stop his involuntary transfer. The court held the action was barred by sovereign immunity enjoyed by the school board.[59]

A male student, who had obtained a preliminary injunction to participate on a Colorado girl's gymnastic team, lost his award of attorney fees when the decision in a companion case was reversed.[60]

A newspaper and newspaper foundation brought an action seeking to direct an Idaho city and school district to publish their legal notices in a properly qualified newspaper. Following an unfavorable decision, the newspaper and foundation appealed the award of attorney fees to the city and school district. In reversing the award, the court determined that the

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56. Oldring v. School Bd. of Duval County, 567 So. 2d 519 (Fla. Ct. App. 1990). *See* Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990). Plaintiff was entitled to attorney fees under § 1988 even though her constitutional claims were not reached as state claims became primary; Associated Builders & Contractors of La., Inc. v. Orleans Parish School Bd., 919 F.2d 374 (5th Cir. 1990). A plaintiff in a civil rights suit was awarded attorney fees as a "prevailing party" under the Civil Rights Attorney's Fees Awards Act.
57. Cumero v. Public Employment Relations Bd., 272 Cal. Rptr. 195 (Ct. App. 1990).
58. McCormick v. Smith, 799 P.2d 287 (Alaska 1990).
59. Foster v. State, 560 So. 2d 502 (La. Ct. App. 1990).
60. Dahlem v. Board of Educ. of Denver Pub. Schools, 901 F.2d 1508 (10th Cir. 1990).

purpose of the suit was not merely to create the possibility of future beneficial commercial transactions. Rather, it was to compel performance of a perceived public duty.[61]

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A New York teacher, who injured her knee when she fell in a school auditorium, sued her board of education for lost, past, and future earnings from an alleged permanent disability incurred at work. Her appeal of the decision for the defendants was unsuccessful. Evidence that a plaintiff voluntarily chose to retire is often considered so prejudicial as to be inadmissible. However, in this instance the court allowed the evidence as it was determined to have significant value with respect to validly raising questions about the teacher's malingering or motivation for not working.[62]

While leading her class down a flight of stairs to the school's gymnasium, a New York teacher slipped and injured her back. In her action against the board of education, the trial court awarded her damages, but rejected her husband's claim of damages for loss of consortium. On appeal, the court reversed the finding on the loss of consortium finding that portion of the decision inconsistent with the recognition of injury to the teacher.[63]

A New York teacher claimed that after she stepped in a liquid left on a school's stairway landing she slipped and sustained injury. In upholding the denial of her claim for damages, the court found that by continuing down thirteen steps, walking through a set of doors, and making a turn before she slipped, no connection could be found between the substance on the landing and her fall.[64]

The Louisiana Department of Education was named in an action brought by a junior high school physical education teacher against parents and the school board. At issue in the appeal was whether a large class size directly contributed to the outbreak of a fight between two students during which a teacher was injured. The appellate court reversed the trial court's holding, finding reasonable minds could differ on whether the Department is legally

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61. Idaho Newspaper Found. v. City of Cascade, 788 P.2d 237 (Idaho Ct. App. 1990).
62. Kish v. Board of Educ., 559 N.Y.S.2d 687 (App. Div. 1990).
63. Safchik v. Board of Educ. of City of N.Y., 550 N.Y.S.2d 679 (App. Div. 1990). *See* Gosnell v. Dorchester School Dist., 389 S.E.2d 865 (S.C. 1990). A husband's loss of consortium was a recoverable loss under the state tort claims act.
64. McCarther v. Board of Educ. of City of N.Y., 554 N.Y.S.2d 912 (App. Div. 1990). *But see* Morris v. Orleans Parish School Bd., 553 So. 2d 427 (La. 1989). A school board was held negligent for failure to repair a leaky water fountain.

entitled to dismissal from the suit. Whether the Department should have been aware, and bore responsibility for noncompliance with class size regulations, was deemed a matter for trial.[65]

An employee of a company, which had contracted with an Alabama school district to provide transportation for handicapped students, was injured when the brakes failed on the bus he was driving. In denying his claim for damages, the Alabama Supreme Court held that the school board had not relieved the contractor of its obligations to properly maintain the vehicle when the company subcontracted with another company to furnish the transportation. However, the contract between the school board and the defendant company was intended to provide benefit for the transported students, not third-party benefits to an employee of a subcontracted company.[66]

A substitute custodian was held not to be acting within the scope of his employment when he had an automobile accident while on the way to work. The action was brought by a motorist who was involved in the accident in an attempt to hold the school board vicariously liable for his injuries. A Maryland appeals court found that the necessity for the custodian to travel to any of thirty different schools did not give the board control and therefore responsibility over the use of his vehicle.[67]

Several employers successfully petitioned the apportioning of liability for claimants' injuries or disability. In Colorado, cases allowed for pension benefits[68] and social security[69] to be deducted from workers' compensation awards. In Washington, when an employee's injury resulted in the worsening of a preexisting condition, the employer was able to recover from a second injury fund.[70] However, in Louisiana a claimant could not have her benefits reduced for receiving disability retirement payments.[71]

An Arkansas widow sought compensation benefits in connection with the death of her husband the morning after he took a required teacher competency test. Her appeal of the compensation commission's denial of benefits resulted in the case being remanded for a new decision. The court held that consideration was required as to whether there was a close temporal relationship between the husband's heart attack and the stressful work-related examination.[72]

The difference between an occupational disease and a compensable personal injury was delineated in an Arizona case. A teacher was forced

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65. Manders v. Singleton, 558 So. 2d 772 (La. Ct. App. 1990).
66. Dupont v. Yellow Cab Co., 565 So. 2d 190 (Ala. 1990).
67. Sheets v. Chepko, 573 A.2d 413 (Md. Ct. Spec. App. 1990).
68. Jefferson County Pub. Schools v. Sago, 786 P.2d 486 (Colo. Ct. App. 1989).
69. Sampson v. Weld County School Dist., 786 P.2d 488 (Colo. Ct. App. 1989).
70. Seattle School Dist. #1 v. Department of Labor and Indust., 786 P.2d 843 (Wash. Ct. App. 1990).
71. Lutz v. Jefferson Parish School Bd., 565 So. 2d 1071 (La. Ct. App. 1990).
72. Mosley v. McGehee School Dist., 783 S.W.2d 871 (Ark. Ct. App. 1990).

to resign when serious health complications developed following her exposure to pesticides in the work-place. The determination that she was suffering from an uncompensable occupational disease, one that was not incidental to the character of the place of employment, was reversed on appeal. The court recognized that the teacher knew she was allergic to pesticides, and that the school district said that she would not be exposed to the chemicals to which she reacted. Since the external cause and the resulting injury were not expected, the court ruled that she suffered an injury for which workers' compensation was appropriate.[73]

Whether a teacher could be compensated for an eye injury he suffered during a Sunday softball game was the issue in a Florida case. The game had been sponsored by a "wellness committee" designed to benefit employees who participated on a voluntary basis. The teacher testified that while he knew participation was voluntary, he became involved for several reasons. Two fellow department chairmen with whom he closely worked had championed the program in his school. The board of education had chosen the school to pilot the program. Finally, the teacher believed the program fostered professionalism, communication, and good public relations, all of which affect the quality of the school. In affirming the denial of benefits, the court held that the activity was not in the course of the teacher's employment, and only indirectly of benefit to the school.[74]

While driving home from school after attending a conference in another city, a teacher was permanently disabled in a traffic accident. The finding that her injuries did not arise out of and in the course of her employment was upheld on appeal. Generally, under what is known as the "going and coming rule," if an employee is injured while going to or from the work-place the injury does not arise out of the course of the employment. By having attended a conference the teacher sought to bring the case within the commercial traveler exception to the rule. However, by stopping at her school, the teacher deviated from a route directly between the conference and her home. Therefore, the court did not find her injury compensable.[75]

A Missouri teacher was injured when the car in which she was travelling turned over while she was enroute to the state capital for the purpose of participating in "Lobby Day." Her request for workers' compensation benefits was denied and appeal was sought. In upholding the denial, the appellate court found it clear that the teacher's trip was not a function of her work. Lobbying, even for improvements in public education and

73. Lorentzen v. Industrial Comm'n of Ariz., 790 P.2d 765 (Ariz. Ct. App. 1990).
74. Hutchinson v. Dade County School Bd., 561 So. 2d 1291 (Fla. Ct. App. 1990).
75. Reynolds v. School Dist. of Omaha, 461 N.W.2d 758 (Neb. 1990).

increased public funding, did not come under the dual purpose or mutual benefit doctrine.[76]

In an Ohio case, a teacher successfully appealed a denial of workers' compensation benefits. Having left her home early to stop at another school, the teacher was injured when she missed a step at the school and fell. The court sought to determine if the injury was received in the course of, and arising out of employment. In considering the totality of the circumstances, the court noted that the teacher stopped by the school to collect money for a "flower fund" used to provide expressions of sympathy and congratulations to school district employees. Furthermore, the stop was made on school district property minutes before the teacher's workday was to begin. In consideration of these facts, the injury was held compensable.[77]

A Wyoming school custodian was killed when he struck a light pole while trying to back his vehicle out of the school's parking lot at the completion of his shift. His truck had become stuck in the snow, and the accident occurred as he attempted to drive the vehicle while holding the door open. The denial of workers' compensation survival benefits was reversed on appeal. The court held that, although the custodian had completed his workday, the injury arose out of and in the course of his employment.[78]

Almost two years after resigning her position, a Pennsylvania special education teacher claimed that her psychiatric condition was caused by the abnormal working conditions she had experienced. She sought appeal of the Workmen's Compensation Appeal Board's decision denying her benefits. The appellate court explained that the claimant cannot rely solely on her own account of her working environment to meet the burden of showing that her injury was not caused by her subjective reaction to normal working conditions. There was no other witness to testify in support of her assertion that her working conditions were abnormal. Neither of her medical experts suggested there was any correlation between her injury and abnormal working conditions. Therefore the court upheld the ruling that the claimant had not sustained her burden of proof.[79]

A North Carolina cafeteria supervisor injured her back when she slipped and fell in a cafeteria freezer. She sought judicial review of the Industrial Commission's decision granting worker's compensation benefits. The court upheld the decision which allowed a 15% disability rating based on the testimony of the plaintiff's surgeon, rather than the 20% to 25% recommended by her treating physician. The Commission was seen as the sole

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76. Stansbarger v. Consolidated School Dist. #1, 796 S.W.2d 938 (Mo. Ct. App. 1990).
77. Fisher v. Mayfield, 551 N.E.2d 1271 (Ohio 1990). *See* Becker v. Clarkstown Cent. School Dist., 549 N.Y.S.2d 739 (App. Div. 1990). Workers' compensation board's summary judgment provided for the employer was reversed as there was a dispute whether the employee's injury was sustained one-half hour before reporting to work.
78. Archuleta v. Carbon County School Dist. No. 1, 787 P.2d 91 (Wyo. 1990).
79. Supinski v. Workmen's Compensation Appeal Bd., 577 A.2d 944 (Pa. Commw. Ct. 1990).

judge of the credibility of the witnesses, and the weight given to their testimony. Also, the plaintiff was not entitled to compensation for medical expenses she incurred with and under the direction of a doctor she chose to see without seeking approval of the commission.[80]

A teacher-claimant and school district-employer sought review of a compensation board's decision. The teacher claimed she had sustained neck and back injuries as a result of physical confrontations with students, and this contributed to her preexisting psychological disability. Additionally, she claimed that exposure to fumes from building roof repairs increased her chemical sensitivity. The court upheld the determination that the exposure to fumes was not a major contributing factor in the teacher's chemical sensitivity. However, the compensation board was reversed on its award of benefits for the neck and back injuries. According to the principal, the teacher had failed to report the confrontations which caused the injuries. Since the board did not explain why it believed the teacher's rendition of the events, that portion of the decision was remanded for reconsideration.[81]

ASSAULT and BATTERY

A North Dakota school superintendent, apparently angry with a teacher who was late getting to her classroom, become engaged in a physical altercation with her. At some point he picked the teacher up, carried her over his shoulder, and deposited her on a couch in the teacher's lounge. The parties differed on the extent of the fight from that stage. Subsequently, the teacher brought a personal injury action against the superintendent and school district. At trial, the jury found the superintendent unjustifiably assaulted the teacher, but while the action was within the scope of his employment, it was not found to amount to willful misconduct. That decision was reversed on appeal and the case remanded for a new trial. The court explained that if the jury correctly found the superintendent committed an unjustified assault, his actions would constitute willful misconduct as a matter of law.[82]

DEFAMATION

A group of Kentucky high school teachers brought an action to recover for libel and invasion of privacy in connection with a newspaper article

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80. Forrest v. Pitt County Bd. of Educ., 394 S.E.2d 659 (N.C. Ct. App. 1990).
81. Benson v. Multnomah County School Dist. #1, 789 P.2d 694 (Or. Ct. App. 1990).
82. Binstock v. Fort Yates Pub. School Dist. No. 4, 463 N.W.2d 837 (N.D. 1990).

about a meeting between parents and school officials. The article, which was distributed by Associated Press, reported that the meeting was called in response to the expulsion of a student for engaging in a fight with a teacher. Also reported was a discussion in which parents called for an investigation of "teachers having affairs with students." The teacher who had been involved in the fight with the student claimed that the article falsely implied that he had engaged in sexual misconduct thereby defaming him and violating his right to privacy. Twenty-seven other teachers from his school joined in the action claiming they had been defamed and their rights to privacy violated. The court held that the article did not defame the group of teachers as such an action would have required the libelous statements to apply identifiably to each member of the group. All the newspapers but one were dismissed from the case since they had simply relied on the wire service before printing the article. The action pertaining to the remaining newspaper and one reporter was left a matter for trial. Wording in the article was arguably seen to leave the impression that the fight and the sexual misconduct were somehow related.[83]

A California teacher alleged defamation in his suit against a student newspaper advisor and school district. In affirming the trial court's dismissal of the action, the appeals court examined each of the student statements under question. The accusation that the plaintiff was the "worst teacher" in the school was seen as a subjective judgment and simply an expression of anger or disgust. Calling the teacher a "babbler" was seen as an exaggerated expression conveying the student's disapproval of the plaintiff's speaking or teaching style. Finally, a headline that described the teacher as "terrorized" by a smoke bomb in his room fell into the category of rhetorical hyperbole. None of the statements was found actionable.[84]

INTENTIONAL INFLICTION of EMOTIONAL DISTRESS

An Illinois school bus driver sexually assaulted a kindergarten student on the way to school. The student's parents brought an action against the school district and bus company for the intentional infliction of emotional distress. The trial court's dismissal of the claim was upheld on

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83. O'Brien v. Williamson Daily News, 735 F. Supp. 218 (E.D. Ky. 1990). *See* Beckham v. S.J. Durant, 387 S.E.2d 701 (S.C. Ct. App. 1989). In a teacher's action against a student for libel and slander, an award of $2,500 was not found excessive. However, see O'Neil v. Peekskill Faculty Ass'n, 549 N.Y.S.2d 41 (App. Div. 1989) where a school district's chief negotiator won a libel action against a faculty association which falsely accused him of uttering a racial slur during contract negotiations.

84. Moyer v. Amador Valley Joint Union High School Dist., 275 Cal. Rptr. 494 (Ct. App. 1990).

appeal. The school district's and bus company's failure to investigate the bus driver's background did not constitute extreme and outrageous conduct. Additionally, the lack of investigation was not found intended to inflict emotional distress. Thus, the parents failed to state a claim.[85]

PRODUCTS LIABILITY

In 1981, an Ohio school district filed suit against an asbestos manufacturer seeking to recover costs of removing asbestos-containing ceiling and fire-proofing products from various buildings.[86] The case developed into a huge suit eventually involving over 100 plaintiffs asserting various claims against numerous asbestos manufacturers and suppliers. Following a settlement, the district court dismissed the suit but a subgroup of the original litigants, eventually joined by fifty-seven new plaintiffs, brought claims against new defendants. Three consolidated interlocutory appeals were at issue in the case decided by the Fifth Circuit Court of Appeals.[87] The plaintiffs sought relief under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[88] They sought to establish that the sale of asbestos-containing building materials constituted "disposal" within the meaning of the statute. The court held that under no circumstances could the term "disposal," as used when referring to the discharge, dumping, leaking, or placing of solid wastes in the environment, encompass the commercial sale of asbestos-containing building products. Additionally, it was clear to the court that it was not the intent of the legislation to target legitimate manufacturers or sellers of useful products.

A South Carolina school board brought an action against a manufacturer whose ceiling materials contained asbestos. Damages were sought for the costs of inspection, testing, and the removal of the hazardous material from school buildings. The manufacturer argued that the trial court incorrectly ruled that asbestos property damage is recoverable in a tort cause of action of negligence. That decision was affirmed when the court held that the economic loss rule (which limits liability for a product defect only to the product itself) does not apply where other property damage is proven.[89]

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85. Giraldi v. Lamson, 563 N.E.2d 956 (Ill. App. Ct. 1990).
86. Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403 (E.D. Tex. 1988).
87. Dayton Indep. School Dist. v. United States Mineral Prods. Co., 906 F.2d 1059 (5th Cir. 1990).
88. 42 U.S.C. § 9607(a).
89. Kershaw County Bd. of Educ. v. United States Gypsum, 396 S.E.2d 369 (S.C. 1990).

CONSTRUCTION CONTRACTS

The low bidder for the maintenance and renovation of a school's soccer field brought suit against the school district to compel the award of the contract. The appellate court upheld the trial court's finding for the district. The failure to meet bid specifications based on a determination that the low bidder does not have the proper equipment to perform the specified work was seen as a rational basis for denying the award of the contract. The school board's decision was not found arbitrary and capricious as a bidder is not absolutely entitled to a hearing before its bid may be rejected.[90]

A New York contractor was the successful low bidder on a contract to paint portions of a middle school. In its advertising specifications, the school district failed to make notice of the prevailing wage requirements. After the contractor stipulated that its employees were due additional wages, suit against the district was brought to recover that added expense. In affirming the trial court's decision, the appellate court agreed that a school district is bound by notice requirements of the prevailing wage requirements. However, the contractor was not found to have a right of action against a school district. Such an action, making the public entity financially responsible for the underpayment, was seen as contrary to an enforcement scheme which places liability for violating wage requirements on the noncomplying contractor.[91]

The second lowest bidder on a contract for the construction of a school brought an action against a Louisiana school board claiming the board's award of the contract to the lowest bidder violated public contracts law. In finding against the construction company, the court explained that an unsuccessful bidder on a public contract who wishes to obtain relief because of the rejection of its bid must seek injunctive relief in a timely manner. This would be at a time when the grounds for attacking the wrongful award of the contract were known or knowable to the bidder and when corrective action could be taken practically by the public body. As the construction project was completed at the time of the hearing, the plaintiff failed to state a cause of action.[92]

Seventeen general contractors filed an action against a Kansas school district seeking a declaratory judgment that statute required the district solicit sealed bids before awarding a management services contract. The trial court's decision for the district was affirmed as the statute did not refer to "services" when describing the requirement for sealed bids.[93]

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90. *In re* K & M Turf Maintenance, 560 N.Y.S.2d 673 (App. Div. 1990).
91. Brian Hoxie's Painting Co. v. Cato-Meridian Cent. School Dist., 556 N.E.2d 1087 (N.Y. 1990). *See* Jacobsen, Morrin & Robbins Constr. Co. v. St. Joseph High School Bd. of Financial Trustees, 794 P.2d 505 (Utah Ct. App. 1990). School Board's appeal was moot due to the board's paying of judgment and mailing of satisfaction to the contractor.
92. Airline Constr. Co. v. Ascension Parish School Bd., 568 So. 2d 1029 (La. 1990).
93. D-1 Constructors, Ltd. v. Unified School Dist. No. 229, 788 P.2d 289 (Kan Ct. App. 1990).

An unsuccessful bidder brought an action against the school board and successful bidder to enjoin a project to perform renovations and additions to two Louisiana schools. The court rendered the bid null and void and remanded the case for further proceedings. The successful bidder had failed to attach to the bid a corporate resolution form. The court explained that public bid laws, to ensure fair competition, require the form as a validation of the authority of a corporation to submit a bid on a particular project.[94]

A New York contractor, who had entered into a series of contracts to perform construction on city schools, sought to avoid delay damages. In finding against the contractor, the court explained that he had the burden of demonstrating that the delays were wholly unanticipated. The demonstration of increased cost as a result of delay was not found to have met that requirement.[95]

In another attempt to avoid delay damages, a general contractor claimed delays in the construction of a District of Columbia school were the result of the District breaching its warranty of commercial availability. Specifically, the contract called for the use of materials available from a single supplier who the contractor alleged could not furnish the materials in a timely fashion. The court held that the contractor was not relieved of the usual risks of nonperformance by subcontractors. Actions of the contractor and subcontractor were found to have caused the delay rather than any unavailability of materials.[96]

The general contractor for the construction of a high school was able to recover from a Georgia school board for claims of two subcontractors. The general contractor presented evidence to the court that any recovery from the school board would be passed on to the subcontractors pursuant to prior agreement of the parties.[97]

A West Virginia school board contracted with an architectural firm to design and supervise construction of a school. After serious structural damage became evident in the building, the board brought a suit for damages against the firm. Prior to the trial court's decision against the firm, two subcontractors settled with the school board. Appeal by the firm resulted in an affirmation of the lower court's decision. However, the amount of

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94. Stafford Constr. Co. v. Terrebonne Parish School Bd., 560 So. 2d 558 (La. Ct. App. 1990).
95. Manshul Constr. v. Board of Educ. of City of N.Y., 559 N.Y.S.2d 260 (App. Div. 1990). *See* Slutsky-Peltz Plumbing & Heating Co. v. Vincennes Community School Corp., 556 N.E.2d 344 (Ind. Ct. App. 1990). Prime contractors unsuccessfully appealed from an order compelling them to submit to arbitration to settle delay disputes.
96. Edward M. Crough, Inc. v. Department of Gen. Servs. of D.C., 572 A.2d 457 (D.C. Ct. App. 1990).
97. Raymer v. Foster & Cooper Inc., 393 S.E.2d 49 (Ga. Ct. App. 1990).

the judgment against the firm was to be reduced by the amount of the settlements from the subcontractors.[98]

The Supreme Court of Alabama reversed the decision by a lower court that an architect had committed a breach of contract by failing to adequately supervise construction of a school. The school board failed to present expert testimony regarding the standard of care imposed within the architectural profession for such weekly inspections as required by the contract. Thus, the board failed to prove that there was a breach of the agreement.[99]

A New York school district brought suit against an architect who provided services in connection with the installation of insulation in a school building. Shortly after the work was completed, condensation problems arose which resulted in extensive damage to the building. The denial of the architect's motion for dismissal based on notice requirements was upheld on appeal. The court held that by seeking the architect's advice as to the causes of the problems and possible solutions, an ongoing professional relationship was maintained serving to extend the notice of claim period.[100]

A New York board of education entered into an agreement for the construction of an elementary school. Specifications for the project included blasting to excavate the site. The state's Department of Education approved the plans which stipulated that the blasting would take place during normal business hours. However, the city cited fire regulations and halted the blasting. Eventually it was determined that the state had preemptive control over the construction of schools and the project was completed. The construction company then sought to recover delay damages from the city. They were successful in this effort as the court found the fire code enforcement by the city to be a discretionary act for which it could be held liable.[101]

A New York subcontractor sought appeal from two summary judgments which dismissed its claims against the board of education and the board's insurer. The school board had discharged the primary contractor alleging poor workmanship. As a result, the contractor allegedly breached its contract with the subcontractor. The decision exonerating the school board from direct liability was upheld as the subcontractor's delay of more than two years far exceeded the three month notice requirement. However, the mechanic's lien against the property of the school district was reversed

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98. Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796 (W. Va. 1990). *See* Board of Educ. of Charles County v. Plymouth Rubber Co., 569 A.2d 1288 (Md. Ct. Spec. App. 1990). Roof warranty was ambiguous and question of its meaning is a question for the jury.

99. Watson, Watson, Rutland/Architects, Inc. v. Montgomery County Bd. of Educ., 559 So. 2d 168 (Ala. 1990).

100. Greater Johnstown City School Dist. v. Cataldo & Waters, 551 N.Y.S.2d 1003 (App. Div. 1990).

101. San Marco Constr. Corp. v. Aetna Casualty and Surety Co., 556 N.Y.S.2d 714 (App. Div. 1990).

and that claim was remanded for trial. The school district had hired a new contractor to complete the work and the mechanic's claim could not be ascertained until the work was completed.[102]

A West Virginia contractor successfully appealed a summary judgment denying him additional compensation for excavation done beyond that specified under contract. In remanding the case for trial, the court held that where the contract is ambiguous, and issues of fact remain, summary judgment is ordinarily not proper.[103]

Additional compensation was denied in a New York case where a contractor attempted to recover for additional costs in connection with unanticipated extra work during construction. The change order price entered into between the contractor and the board of education was not found binding or enforceable until approved by the board of estimate.[104]

A Massachusetts school district filed petition to vacate an arbitration award made to a contractor. The trial court based its approval of the award on the fact that the contract had a "no damages for delay" clause. The court upheld the decision, explaining that arbitration is subject to a very narrow scope of review. Furthermore, when there is room for interpretation of a contract's boundaries, the issue properly lies within the broad authority of the arbitrator.[105]

CONSTITUTIONAL TORTS

Student Initiated Cases

An elementary school band teacher hit or tapped a student on the head with his grade book. From the record it is not clear why he did this. The student's parents brought an action against the teacher and principal alleging improper corporal punishment. The decision to discipline a student through excessive force can, according to the court, constitute an invasion of the child's fifth amendment liberty interest and a violation of substantive due process prohibited by the fourteenth amendment.[106] General issues of material fact were found, leading the appeals court to deny the defendant's motion to dismiss the constitutional claim. However, the action

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102. Rure Assoc. Inc. v. Dinenardi Constr. Corp., 917 F.2d 1332 (2d Cir. 1990).
103. Ohio Valley Contractors, Inc. v. Board of Educ. of Wetzel County, 391 S.E.2d 891 (W. Va. 1990). *See* Owners Realty Management Constr. Corp. v. Board of Educ. of West Islip Union Free School Dist., 554 N.Y.S.2d 648 (App. Div. 1990). Issues of fact existed as to whether disputed work was within the scope of the original contract.
104. Manshul Constr. Corp. v. Board of Educ. of City of N.Y., 551 N.Y.S.2d 497 (App. Div. 1990). *See* Board of Educ. Longwood Cent. School Dist. v. Hatzel & Buehler, Inc., 549 N.Y.S.2d 447 (App. Div. 1989). School board successfully stayed arbitration in which contractor sought to recover additional costs incurred by delays.
105. Plymouth-Carver Regional School Dist. v. J. Farmer & Co., 553 N.E.2d 1284 (Mass. 1990).
106. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988).

alleging the student's due process rights were violated by the principal's lack of supervision was dismissed.[107]

In an attempt to maintain discipline, the aide to a New Mexico high school gym teacher broke a student's arm when he threw the student to the floor. The student's civil rights action against the teacher and aide was unsuccessful and that decision was upheld on appeal. The district court explained that the right the student claimed was violated is not simply to be free from random unauthorized deprivations of liberty. Rather, it is to be free from such deprivations in the absence of adequate post-deprivation remedies. In this case, federal judges in New Mexico had split on the question of whether the state provided adequate remedies for students whose procedural due process rights were violated by excessive punishment. Because of this uncertain state of law, the court found that the defendant's actions could reasonably have been thought to be consistent with the right they were alleged to have violated.[108]

In a Pennsylvania case a student and his mother alleged a violation of the student's civil rights when he allegedly was shaken, thrown into his seat, and struck by a school bus driver. In dismissing the case, the court found that the alleged action had a plainly legitimate purpose, that of maintaining order on a moving school bus. Second, the action did not go so far beyond the bounds of decency that there was no relation between the force allegedly used and the needs of the situation. Third, the injuries were not such as would be associated with a malicious, sadistic beating. Finally, there was no allegation that the school board was aware of any repeated use of excessive force.[109]

A Wisconsin teacher's actions and a school district's policy regarding the use of physical force were examined in a case where the teacher either pushed or threw a high school student into a blackboard. The student alleged violation of his rights under the fourth, eighth, and fourteenth amendments. The defendant teacher, principal, superintendent, and school district's motion for dismissal of the claim was granted in part and denied in part. Seeing the issue as one of possible excessive corporal punishment, the court explained that the eighth amendment protection against cruel and unusual punishment is not to be used to scrutinize its imposition in public schools.[110] While the student was seized within the literal meaning of the term when he was pushed or thrown against the blackboard, this was not found to warrant the invocation of the fourth amendment right to be free

106. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988).
107. Meyer v. Litwiller, 749 F. Supp. 981 (W.D. Mo. 1990).
108. Coriz v. Martinez, 915 F.2d 1469 (10th Cir. 1990).
109. Anderson v. Everett Area School Bd., 732 F. Supp. 39 (W.D. Pa. 1989).
110. Ingraham v. Wright, 430 U.S. 651 (1976).

from unreasonable seizure of one's person. The school district's policy did not condone random acts of violence or use of physical force, thus the policy was not seen to have been a moving force behind a fourteenth amendment due process violation. However, sufficient facts of physical and emotional injury to the student were set forth to create a jury question precluding dismissal of the teacher's alleged violation of the amendment's guarantee of substantive due process.[111]

A Georgia high school student sought damages from her school district for alleged intentional gender-based discrimination following a sexual relationship with her coach/teacher. The action was brought under title IX of the Educational Amendments of 1972.[112] The district court's dismissal of the action was upheld on appeal. The court explained that title IX was patterned after title VI of the Civil Rights Act of 1964, and that cases involving them could be discussed interchangeably.[113] The court looked to the Supreme Court for guidance and determined that while there could be no cause of action for compensatory damages for unintentional discrimination, the question of such an action for intentional discrimination was open.[114] Following binding circuit precedent, and with no such precedent from the Supreme Court, the court found that damages are unavailable under titles VI and IX.

Gender-based discrimination also was at issue when a former Pennsylvania student brought an action to recover for dismissal from her school's chapter of the National Honor Society. The district court found as fact that she was dismissed because of premarital sexual activity and not because of gender discrimination. The Third Circuit Court of Appeals upheld that decision, but remanded the case for the limited purpose of the consideration of evidence of premarital sex by a male member who was not dismissed from the society. The court added that should the dismissal be found motivated by a discriminatory intent that violates title IX, the district court should consider the possibility of compensatory damages.[115]

Six Missouri students brought a civil rights action against the board of education alleging that their teacher had sexually abused them and that the board had failed to report the abuse, and refused to receive, investigate, act upon, or otherwise prevent or rectify the situation. The board's motion for summary judgment was granted. The principal's knowledge that two students had filed complaints of sexual abuse nine years apart was not found to have constituted notice to the school board. Furthermore, the teacher's alleged abuse of the students did not amount to a pattern of unconstitu-

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111. Thrasher v. General Casualty Co. of Wis., 732 F. Supp. 966 (W.D. Wis. 1990).
112. Codified as amended at 20 U.S.C. §§ 1681-1688 (1988).
113. Except for the substitution of the word "sex" in title IX to replace the words "race, color, or national origin" in title VI, the two statutes are substantially alike in intent and redress.
114. Guardian Ass'n v. Civil Servs. Comm'n, 463 U.S. 582 (1983).
115. Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990).

tional misconduct necessary to establish liability of the board in a civil rights action.[116]

Another Missouri case examined whether a school district had been deliberately indifferent to students' constitutional rights. The district had received reports of isolated incidents of misconduct by a school bus driver, and ultimately the driver was arrested for sexual abuse. However, since the court held that the district did not have notice of a pattern of unconstitutional acts, no tacit authorization or deliberate indifference of the students' constitutional rights was found.[117]

A civil rights action was brought against an Oklahoma school district for acts of sexual molestation an elementary school teacher committed against three students. Ten years before he was hired, the teacher had been convicted of sodomy in Texas. The trial court entered a jury decision for the students and the district appealed. In reversing the decision, the court held the acts of molestation to be too remote a consequence of the school district's hiring and investigation policies three years earlier to impose liability. Also, the teacher was not found to have been acting under the color of state law when he molested the students. The acts were committed in the teacher's home during summer vacation while the students were engaged in fund-raising activities for a nonschool basketball camp.[118]

A Louisiana student brought a section 1983 action against the school board and school officials after officials rejected the valedictory speech the student planned to give at her graduation ceremony. The Fifth Circuit Court of Appeals upheld the trial court's dismissal of the action. This conclusion was reached without examining the constitutional issues. The court concluded that even if the case were remanded for trial, and rights were found to have been violated, the same conclusion would be reached. That is, money damages cannot be imposed for any constitutional wrong under section 1983 in connection with censorship.[119]

Two grammar school students and their parents brought suit claiming civil rights violations by various state and local school employees during a child abuse investigation. The dismissal of the action was upheld on appeal. The Illinois court held that school personnel, who removed the students from their classroom and subjected them to questioning and physical examination to determine if they were abused, were entitled to qualified immunity from the civil rights claims. Furthermore, the actions of the school employees were not found to have violated any clearly established consitutional rights of the students.[120]

When a Texas woodshop instructor stepped into a small storage room

116. Thelma D. v. Board of Educ. of St. Louis, 737 F. Supp. 541 (E.D. Mo. 1990).
117. Jane Doe v. Special School Dist. of St. Louis County, 901 F.2d 642 (8th Cir. 1990).
118. D.T. by U.T. v. Independent School Dist. No. 16, 894 F.2d 1176 (10th Cir. 1990).
119. Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990).
120. Landstrom v. Illinois Dep't of Children and Family Servs., 892 F.2d 670 (7th Cir. 1990).

for additional supplies during class, a student sustained injury. The teacher successfully sought to have the action for damages against him dismissed. The court held that the statute conferring immunity on professional school district employees, though intended to bar tort liability, did not bar claims arising under due process clauses of the state and federal constitutions. However, the teacher was not found to have acted with callous indifference to the student's rights when he stepped into the storage room.[121]

Employee Initiated Cases

After she was dragged from her classroom by her principal, an Ohio teacher alleged that she suffered embarrassment, humiliation, fear, anxiety, and loss of sleep and appetite. A federal cause of action was sought under title VII of the Civil Rights Act of 1964 and deprivations of her fourth and fourteenth amendment rights. She also alleged state law claims for assault and battery, intentional infliction of serious emotional distress, negligence, and libel. The principal's actions, which took place in front of the teacher's students, involved pushing her, grabbing her by the shoulder and arms, and in the process of pulling her from the room, injuring her foot and causing her nylons to be ripped. The district court found that the alleged actions by the principal were not of constitutional magnitude and did not involve deadly force, thus failing to establish a section 1983 claim. Furthermore, the teacher's complaint failed to specify whether individuals were being sued in official, personal, or individual capacities. Finally, the court stated that the issues of human dignity and standards of decency raised in the case were serious, and if proven would justify appropriate relief in a court of general jurisdiction.[122]

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121. Moore v. Port Arthur Indep. School Dist., 751 F. Supp. 671 (E.D. Tex. 1990).
122. Coleman v. Wirtz, 745 F. Supp. 434 (N.D. Ohio 1990).